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| IN THE MATTER OF | : | BEFORE THE |
| **DURGE, LLC** | : | HOWARD COUNTY |
| | : | BOARD OF APPEALS |
| Petitioner | : | HEARING EXAMINER |
| | : | **BA 06-023N** |

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## DECISION AND ORDER

On July 24 and August 7, 2006, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Durge, LLC, Petitioner, for the enlargement and extension of a nonconforming use for a gasoline service station located in a B-1 (Business: Local) Zoning District, filed pursuant to Section 129 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

Richard B. Talkin, Esquire, and Sang Oh, Esquire, represented the Petitioner. No one testified in support of the petition. No one appeared in opposition to the petition.

## FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. The subject property, known as 7894 Washington Boulevard (U.S. Route 1), is located in the 1st Election District at the northeast corner of the intersection of Washington Boulevard and Maryland Route 175 in Elkridge (the “Property”). The Property is identified on

Tax Map 43, Grid 9, as Parcel 601, Lot A.

The Property is a pentagonal-shaped parcel consisting of about 35,201 square feet. The lot has about 180 feet of frontage on Washington Boulevard and is about 165 feet deep. The west lot line of the Property is a convex angle, but does not adjoin or have access to Route 175.

The Property is improved with a one-story, three-bay, 1,200-square foot gasoline service station building with an attached 990-square foot convenience store addition. The buildings are situated about 100 feet from the Washington Boulevard frontage. In front of the building are four fuel dispensers on two islands under a rectangular canopy. The front edge of the canopy is about 32 feet from the font lot line. Large paved areas surround the buildings and striped parking areas are located near the buildings and along the west lot lines.

Access to the site from Washington Boulevard is gained via two driveway entrances separate by a large island at the south side of the Property. The majority of the rest of the site is comprised of paved drive aisles and parking areas. A 20' wide landscape buffer area with a lawn and evergreen trees is located along the rear lot line.

2. The Property is the site of a gasoline service station and convenience store. The gasoline service station was first established in 1971 when the Property was zoned M-1, in which district a gasoline service station was permitted as a matter of right. The zoning was changed in 1977 to B-1, in which zone gasoline service stations are not permitted. In 1978, the gasoline service station was confirmed by the Board of Appeals as a nonconforming use under BA Case No. 972-C. In that case, the Board of Appeals also approved the construction of the existing canopy.

3. The Petitioner seeks to enlarge and extend the nonconforming use by replacing the four

existing fuel dispensers with six fuel dispensers; removing the existing canopy and replacing it with a new canopy measuring 46 feet by 54 feet; constructing a 450-square feet car wash to the west of the existing gasoline service station building; and installing a 10-feet wide car wash drive and stacking aisle along the east side and rear of the Property. The Petitioner also plans to build an 800-square foot carry-out restaurant with five associated parking spaces to the east of the existing convenience store. A carry-out restaurant is a use permitted as a matter of right under Section 118.B.42 and therefore is not subject to my review for the purposes of this proceeding.[1]

4. The property to the north and east of the Property is also zoned B-1 and is improved with a two-building, one-story shopping center development. Immediately east of the Property is a driveway and parking area, while the area to the immediately to the north is a parking lot and a stormwater management facility.

5. The non-conforming use plan (Exhibit 1) depicts a future right-of-way line bisecting the Property approximately 38-41 feet from the Property's front lot line. The future ROW line is drawn 75 feet from the center line of Washington Boulevard. From this future ROW line, the proposed canopy will be situated 4-5 feet to the north. The proposed drive aisle and stacking lane will begin about 2 feet north of this line.

[1] The DPZ report noted that the convenience store has never been approved as an extension of the gasoline service station nonconforming use and suggests that it is therefore an unauthorized use. Like a restaurant, however, a convenience store is a use permitted as a matter of right in the B-1 zone (see Section 118.B.17) and therefore does not require approval under Section 129.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

**I. Extension, Enlargement or Alteration of Nonconforming Uses (Section 129.E).**

A. The Petitioner proposes to enlarge and extend[2] the nonconforming gasoline service station use by replacing the four existing fuel dispensers with six fuel dispensers; removing the existing canopy and replacing it with a new canopy measuring 46 feet by 54 feet; constructing a 450-square feet car wash to the west of the existing gasoline service station building; and installing a 10-feet wide car wash drive and stacking aisle along the east side and rear of the Property. The only change or addition to the activities taking place in connection with the nonconforming use is the addition of the car wash and associated drive/stacking lane. Car washes are commonly associated with gasoline service stations; indeed, the conditional use criteria for gasoline service stations permit car washes and convenience stores to be located on the same lot. I conclude, therefore, that the addition of the car wash will not change the use in any substantial way, in accordance with Section 129.E.1.a.

B. The 880 square foot car wash addition is less than 75% of the 1,200 square foot gross floor area of the existing gasoline service station building, and about 40% of the 2,190 square foot gross floor area of the service station and convenience store combined, which is less than the maximum increase of 100% of the gross floor area allowed by Section 129.E.1.b.

[2]An "enlargement" of a nonconforming use is the increase in size of any structure containing the nonconforming use, the construction of an additional structure on the same lot, or an increase in the land area occupied by the nonconforming use. An "extension" is any change in the types of activities taking place in connection with the nonconforming use. Section 129.A. The proposed canopy and fuel dispensers would therefore be considered an enlargement, while the proposed car wash and drive/stacking lane would be considered both an

C. The outdoor land area occupied by the nonconforming use will not be enlarged in compliance with Section 129.E.1.c.

D. See discussion in Part II below.

E. The Property is located at the intersection of a large and busy intersection and next to a large shopping center. While the addition of two fuel dispensers and a car wash could slightly increase the traffic to or on the Property, the impact of this increased intensity on the surrounding uses will be relatively minimal. Consequently, the proposed enlargements and extension will not cause adverse effect on vicinal properties in accordance with Section 129.E.1.e.

**II. <u>Setback From Public Street Right-of-Way.</u>**

Section 129.E.1.d requires me to determine whether the proposed enlargements will cause a violation of the bulk regulations for the zoning district in which the property is located. The DPZ Report recommends denial of the petition because a portion of the proposed canopy, three of the proposed fuel dispensers, and a portion of the proposed car wash drive/stacking lane will be located less than 30 feet from the future ROW of Washington Boulevard. DPZ contends that this circumstance would cause a violation of Section 118.D.2.a, which requires a minimum structure and use setback of 30 feet from a "public street right-of-way."

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enlargement and an extension.

The Petitioner argues, on the other hand, that the proposed enlargements do not violate the bulk regulations because they are all situated more than 30 feet from the front lot line, which is the boundary of the existing right-of-way for Washington Boulevard. The issue, then, is whether the required 30-foot setback from the "public street right-of-way" is to be measured from the existing or future right-of-way boundary.

A "right-of-way" is defined in Section 103.A.138 of the Zoning Regulations as follows:

> A strip or parcel of land *designated for use* as a street, highway, driveway, alley or walkway, or for any drainage or public utility purpose or other similar uses. For public streets, the right-of-way width shall be as required by the State for State roads and the Howard County Design Manual for County roads (italics added).

The Petitioner contends that there is nothing in this definition that authorizes DPZ to measure a setback from a planned or future right-of-way boundary. The land designated for use as a public street in this case, the Petitioner argues, is that land owned by the State and currently used for the Washington Boulevard right-of-way, the boundary of which coincides with the southern boundary of the Property. According to the Petitioner, the future right-of-way line represents only a proposed boundary that is speculative in nature and may never be realized. It is therefore not yet (and may never be) "designated" for use as a public roadbed. What's more, the Petitioner suggests, the use of a proposed ROW as a means of defining a zoning setback may constitute an illegal reservation and therefore an unconstitutional taking of land without just compensation.

During the proceedings, and pursuant to Rule 10.4, I asked DPZ to advise me as to the basis for the staff report's assertion that the setback must be measured from the future, rather

than the existing, ROW. DPZ responded (see Exhibit 1) by referring to a letter dated March 15, 1976 from Thomas G. Harris, Jr., then Director of Planning, to the Chairman of the Board of Appeals. The letter, in turn, refers to a Maryland Court of Appeals decision, *Krieger v. Planning Commission of Howard County,* 223 Md. 320., 167 A.2d 885( 1961), which Mr. Harris claims "affirmed the right of Howard County to require the establishment of a future right-of-way line of a highway shown on the County General Plan of Highways and to require the building setback line to be measured from the proposed right-of-way line." Mr. Harris' letter notes that "in the case of U.S. Route 1, this highway is shown on the 1971 General Plan of Highways as a principal arterial multi-lane divided highway with a minimum right-of-way width of 150 feet or 75 feet from the existing center line. Land presently zoned in the M-1 District would, therefore, be required to maintain a distance of 75 feet from the center line of U.S. Route 1 for the future right-of-way line plus an addition al 50-foot distance for the setback requirement."

If the *Krieger* case interpreted the above-quoted definition of "right-of-way" to include a proposed or future ROW (and the *Krieger* case was still good law), our inquiry might end here. Unfortunately, it does no such thing. Instead, *Krieger* involved a <u>constitutional</u> challenge to a <u>subdivision</u> regulation that required a developer to exclude the bed of a planned road when laying out lots to meet a minimum 20,000 square foot lot size. The Court ruled that the regulation did not constitute an unlawful taking. The Court did <u>not</u> rule (and was not asked to rule) whether the language of the regulation authorized the exclusion of the future roadbed in the first place. Moreover, the Court did not (and was not asked to) interpret the County's zoning regulations or any regulation containing the language at issue in this case. Consequently, it does not provide a

basis for finding that Section 103.A.138 authorizes the building setback line to be measured from the proposed right-of-way line.

This is necessarily an issue of statutory construction. The cardinal rule of statutory construction is to ascertain and carry out the real intention of the legislature. The primary source from which we glean this intention is the language itself. We first accord the words their ordinary and natural signification. We must also consider the context in which the provision appears and interpret it in the context of the entire statutory scheme. If the words of a provision are ambiguous, i.e., "reasonably capable of more than one meaning" – that is, their meaning is intrinsically unclear or their application to a particular object or circumstance is uncertain – then resort may be made to surrounding circumstances such as legislative history and prior case law. The effort is to discern the meaning and effect of the language in light of the objectives and purposes of the provision enacted. Such an interpretation must be reasonable and consonant with logic and common sense. *The Mayor and Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514 (2003).

In examining the language of the regulation itself, it is apparent that a plain meaning approach does not yield a ready answer. The word "designate" means "to mark or point out; indicate; show; specify." *Dictionary.com Unabridged (v 1.0.1)*. Retrieved September 05, 2006, from Dictionary.com website: http://dictionary.reference.com/search?q=designate&x=22&y=19. A right-of-way is therefore a parcel of land shown or specified for use as a public street. The phrase "designated for use," however, begs the question: Shown where? By what or who is the use designated? And, by what means? Moreover, does the phrase include the designation of

land for future or only present use? Similarly, the phrase "as required by the State" fails to provide a clue as to whether the requirement is intended to cover proposed as well as current standards. Because Section 103.A.138 is reasonably capable of more than one meaning, our next recourse is to the legislative history of the provision and the statutory framework in which it was enacted.

Legislative History

Prior to 1977, the Howard County Zoning Regulations ("HCZR") did not contain "setback" restrictions or define a public "right-of-way." Instead, a property was subject to "yard" restrictions. In the B-1 zone, for example, a lot was required to provide a "front yard" not less than 50 feet in depth.[3] Section 11.042, 1971 HCZR. A "yard" was defined as "an open space on the same lot with a building which lies between the building and the *lot line* and is open and unoccupied from the ground up." Section 37.23 (italics added). A "front yard" was further defined as "a yard extending across the full width of the lot and lying between the *front line of the lot* and the nearest line of the building. The depth of a front yard shall be measured at right angles to the *front line of the lot."* Section 37.13 (italics added).

It is evident from these provisions that, prior to 1977, the yard restriction was intended to be measured from a property's lot line and not from any street right-of-way boundary (current or future).[4]

As part of the 1977 comprehensive rezoning process, however, the concept of the "yard"

[3] Parking was permitted in this front yard area of the B-1 zone. Section 11.042.

[4] Nonetheless, Mr. Harris' Department was apparently interpreting and enforcing the setback from the

restriction was replaced by the "setback." In the B-1 zone, for example, a minimum building or use "setback" was established at 30 feet from a "public right-of-way." Section 113.C.2.a(1), 1977 HCZR. The regulations defined "setback" as an "open area, located on the same lot with a building or group of buildings, between the building or outer building of a group and the nearest lot *or street* line, unoccupied and unobstructed from the ground upward, except as provided in these regulations." Section 104.A.80, 1977 HCZR (italics added). Although "street line" was undefined, a "right-of-way" was defined for the first time as "a strip or parcel of land designated for use as a street, highway, driveway, alley, or walkway, or for any drainage or public utility purposes or other similar uses." Section 104.A.76.

The 1977 regulations thus created a distinction, not found under the old "yard" requirement, between a "lot line" and a "street line" or "right-of-way" boundary for the purposes of the setback measurement. The legislature apparently intended to differentiate the location of a lot line of a given property from a street line or right-of-way line. Why make this distinction? I can think of two plausible explanations. The first, which best fits the DPZ view, is that the legislature intended that when a right-of-way is "designated" but not yet acquired and owned by the State or County, and the proposed right-of-way boundary falls within the lot, the setback should be measured from the proposed street line. A second possible explanation is that the legislature intended to cover those situations in which a property is separated from the right-of-way boundary by another strip of land. Where there is some property intervening between the ROW boundary and the property's lot line, the ROW setback would be measured from the ROW

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future right-of-way as early as March 1976.

boundary, not the lot line. To this point in our analysis, then, the meaning of Section 103.A.138 remains ambiguous.

Although not applicable to the B-1 zone, other provisions of the 1977 regulations – specifically, those defining "front setback" and "side setback" - lend some support to DPZ's interpretation:

> "Setback, front: Extends across the full width of lot, between the front street line (*or proposed front street line*) and the nearest line of the building or enclosed portion thereof. The depth of the setback is the shortest horizontal distance between the front existing *or proposed* street line and the nearest point of building or enclosed portion thereof.
> ….
>
> Setback, side: Extends between the side lot line or side street line (*proposed side street line, if such line falls within the lot*) and the nearest line of building, porch or projection thereof, extending from the front setback to the rear setback, or in the absence of either of such setbacks, to the front street line and/or rear lot line. The width of side setback is the shortest distance between the side lot line and the nearest point of building, porch or projection."
>
> Section 104.A.80.a and c (italics added).

From this language, one may glean intent not only to distinguish between lot lines and street lines, but also between existing and proposed street lines. Curiously, this distinction was not explicit in the definitions of either "setback" or "right-of-way." Moreover, the definitions of front and side setback do not explain how or by whom the street lines are proposed.

These definitions remained unchanged through the 1985 comprehensive zoning plan until 1989, when the definition of "setback" was revised in what was characterized as "housekeeping" amendments (see ZB Case No. 882R):

> "Setback: Open area, located on the same lot with a structure or group of

> structures, between the structure or outer structure of a group and the nearest lot or ~~street line~~ *public street right-of-way,* unoccupied and unobstructed from the ground upward, except as provided in these regulations."
>
> Section 103.A.104, 1985 HCZR, as amended by ZB Case No. 882R.

The amendment *inter alia* substituted "public street right-of-way" for "street line." That this change was characterized as a housekeeping amendment supports the notion that the two terms were considered synonymous. The definition of "right-of-way" remained unchanged. The definitions of "front setback" and "side setback," however, were more significantly modified:

> "Setback, front: Extends across the full width of lot, between the front ~~street line (or proposed front street line)~~ *public street right-of-way* and the nearest line of the structure or enclosed portion thereof. The depth of the setback is the shortest horizontal distance between the front ~~existing or proposed street line~~ *public street right-of-way* and the nearest point of structure or enclosed portion thereof.
> ….
>
> Setback, side: Extends between the side lot line or side ~~street line (proposed side street line, if such line falls within the lot)~~ *public street right-of-way* and the nearest line of structure, porch or projection thereof, extending from the front setback to the rear setback, or in the absence of either of such setbacks, to the front ~~street line~~ *public street right-of-way* and/or rear lot line. The width of side setback is the shortest distance between the side lot line and the nearest point of structure, porch or projection."
>
> Section 103.A.104.a and c (italics added).

In these definitions, the amendment not only substituted "public street right-of-way" for "street line," but also eliminated the prior references to a "proposed" street line. This deletion leads to one of two plausible conclusions: (1) the legislature intended that a setback should <u>not</u> be measured from a proposed street line, or (2) the legislature believed that the definition of "right-

of-way" sufficiently encompassed both existing and future rights-of-way. Ambiguity persists.[5]

No pertinent changes in the regulations occurred between 1989 and 2004. As part of the 2004 comprehensive zoning plan, the definition of "right-of-way" was amended to add the sentence, "For public streets, the right-of-way width shall be as required by the State for State roads and the Howard County Design Manual for County roads."[6] In addition, the definition of "setback" was revised to read as it presently exists:

> "Setback: The distance between a structure or use and a boundary such as a lot line, project boundary, right-of-way line, or zoning district boundary. A setback is measured as the shortest horizontal distance between the project boundary and the nearest point of the use, structure or projection thereof. *Where these regulations require a minimum setback from a zoning district or right-of-way, and the property subject to the setback does not abut or adjoin the zoning district or right-of-way, the required setback is measured across the intervening properties."*
>
> Section 103.A.145 (italics added).

Additionally, the definition of "front setback" was modified to its present form:

> "Setback, front: Extends across the full width of the lot, between the front public street right-of-way or front lot line and the nearest line of the structure or enclosed portion thereof:
>
> a. For lots that front directly on a public street, the front setback is measured from the public street right-of-way providing access to the lot and towards which the front of the house is to be oriented.

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[5] DPZ's rezoning petition in favor of the changes appears to support the latter conclusion. In describing the proposed changes to the definition of "setback," the petition stated: "Use the term 'public street right-of-way' in place of 'street' or 'proposed street' to be consistent with other sections of the Regulations."

[6] Presumably, this language was added to clarify the source from which the measurement of the right-of-way is derived. It does not identify the source of the *designation* of the use, as the Design Manual does not determine which land parcels shall be roads, but only how they are to be designed once designated.

> b. For pipestem lots and lots with no frontage on a public street, the front setback is measured from the front lot line assigned when the lot is recorded. The front lot line is the lot line towards which the front of the house is to be oriented and shall be selected in order to provide the best utilization of the lot and greatest privacy for the adjacent lots."

Section 103.A.146.

The 2004 changes in the "setback" and "front setback" definitions help to resolve one of the ambiguities inherent in previous incarnations of the regulations. These revisions clarify that one reason for distinguishing between a "lot line" and a "right-of-way line" is to cover those situations in which a property is separated from the right-of-way boundary by another strip of land. Where there is some property intervening between the ROW boundary and the property's lot line, the ROW setback is to be measured across the properties and from the ROW boundary, not the lot line. Likewise, where there is some property intervening between the ROW boundary and the property's front lot line, the front setback is to be measured from the front lot line.

What can one reasonably conclude from these legislative meanderings? We can safely glean only that the legislature intended that a lot line and a right-of-way line can be separately defined boundaries for the purposes of measuring a setback. It remains unclear, however, how a right-of-way comes to be "designated" for use and the ROW line established.

General Plan/SHA.

The issue remains, then, whether the term "designated for use" as used in Section 103.A.138 can be read to refer to land that is planned or proposed as a future roadbed. Neither the language of the regulations nor the legislative history sheds meaningful light on this phrase. We must therefore seek extrinsic evidence of the legislature's intent.

A reasonable person reading Section 103.A.138 may ask: by what method, other than the acquisition by a government entity by purchase or condemnation, could a parcel of land be "designated" for use as a public street? Presumably, DPZ would argue, as Mr. Harris did in 1976, that the "General Plan of Highways" designates the use of particular parcels of land for public roadways. Unfortunately, the General Plan of Highways is a document that no longer exists. The current Howard County General Plan, however, does include a transportation planning element. Chapter 4 of the 2000 General Plan lists "key highway improvements [that] are anticipated by 2020 to address projected demand within projected funding constraints." For example, portions of I-70, U.S. 29, Maryland Route 32, and Maryland Route 108 are proposed to be expanded. The intersection of U.S. Route 1 and Maryland Route 175 is targeted for "capacity improvement." Significantly, the Plan does not mention any expansion of the Route 1 roadbed.

Among the Plan's proposals for future action is to "pursue the construction of road improvements shown on the Transportation Map 2020 of this General Plan." Policy 4.8, page 12. That plan shows road classifications and identifies certain roads and intersections in need of improvement. U.S. Route 1 is classified as an "intermediate arterial."[7] The intersection of U.S. Route 1 and Maryland Route 175 is identified as needing "intersection improvement." While some roads are designated as in need of "capacity/geometric improvement," Route 1 is not one of them.

[7] According to Mr. Harris' letter, Route 1 was classified as a principal arterial in 1976.

The Maryland State Highway Administration's Comprehensive Transportation Plan also identifies parcels of land for future use as State roadways. A cursory review of the SHA's website reveals that the agency has established a project (No. HO332-11) within its Comprehensive Transportation Plan that is aimed at the "study of potential improvements along the US 1 corridor from the Prince George's County line to the Baltimore County line, including potential interchange improvements at MD 175, Guilford and Corridor Roads (11.0) miles." www.sha.state.md.us?WebProjectLifeCycle/Project/Inormation.asp?projectno=HO332_11. The project is depicted as being in the planning phase and is currently not funded. The SHA estimates that the project will be completed beyond the 6-year duration of the CTP.

Based upon its limited response, I must presume that DPZ would argue that the phrase "designated for use" as used in the definition of right-of-way was intended to refer to the provisions of either the Howard County General Plan or SHA Comprehensive Transportation Plan which identify potential new roadways or improvements to roadways. Under the facts of this case, however, DPZ's position, for three reasons, is untenable.

First, it is evident that neither the 2000 General Plan nor the SHA has in fact "designated" Route 1 for roadbed expansion anywhere, much less onto the Property. While the General Plan and Transportation Map 2020 refer to possible intersection improvements, neither "specify" that the roadway will be widened at all. The SHA plan merely calls for the study of potential improvements, including the potential interchange improvements at Route 1 and Route 175, of the Route 1 corridor. It cannot be reasonably concluded from this general description that the SHA has marked, indicated, or specified that the portion of Route 1 located in front of the Property or, for that matter, any portion at all, is intended to be widened.

Secondly, the long-term, speculative and uncertain nature of these provisions belies a conclusion that the legislature intended them to serve as "designations" for street use. The General Plan speaks in terms of "anticipating" the need for road improvements by the year 2020; the SHA CTP project requires only the "study" of potential improvements along the Route 1 corridor and does not even contain funding for it. These provisions indicate that any potential work on Route 1 in the vicinity of the Property is indefinite and will occur, if at all, in the distant future. They serve only as ideas, subject to future decision, and cannot reasonably be interpreted as definitive "designations" of the future use of the Property. Indeed, the indefinite nature of the County and SHA plans would likely render DPZ's application of the "right-of-way" definition to this case "void for vagueness" under a constitutional due process analysis.[8]

[8] This is not to mention the fact that the definition does not clearly refer to either the General Plan or the SHA CTP – or to any other source, for that matter. If a reasonable reader cannot divine the source of a reference, the statute itself is likely void on its face.

Constitutionality.

There is yet another reason why DPZ's interpretation requiring that the setback be measured from the "future" right-of-way is unsupportable in this case. Maryland courts have held that a governmental "reservation" of land for an indefinite period that denies all beneficial use of the land placed in reservation without compensation is an unconstitutional taking. In *Howard County v. JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1984), the Court of Appeals declared that a "reasonable nexus" must exist between the reservation of subdivision lands for roads and the subdivision itself for the reservation to be noncompensable. No such nexus was found, and the Court held that the landowner was deprived of all use of his land. Id. at 282. See also *Steel v. Cape Corporation*, 111 Md. App. 1, 677 A.2d 634 (1996).

In this case, DPZ's use of the future right-of-way line from which to measure the structure and use setback in the B-1 zone essentially reserves to the government nearly half of the Petitioner's property. Unlike the facts of the *Krieger* case, the setback restriction here prohibits the Petitioner from making any reasonable or economically viable use of that portion of the Property. Like the *JJM* case, the restriction is unlimited in duration. Moreover, there is no reasonable nexus between the setback restriction and the Petitioner's development of the Property. In other words, it has not been shown that the need to expand the Route 1 roadbed arises out of the Petitioner's proposed use of the Property. Indeed, no need has been established.

In short, DPZ's interpretation of the setback requirement brings it dangerously close to a potential takings claim. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). The better interpretation, and the one which avoids this potential constitutional pitfall, is to measure the setback from the existing right-of-way.

This is not to say that a setback regulation could not be fashioned that might alleviate the legal and constitutional obstacles while achieving the government's goal to prevent construction on land earmarked for highway use. Such a regulation, however, must be specific and unambiguous. It should clearly state that the setback will be measured from a future or proposed right-of-way. The proposed right-of-way line should be one that is clearly demarcated on a specified and readily accessible public planning document. What's more, the planning document should be one with a reasonable and definitive timeframe for completion of the road improvements.

Conclusion.

In this case, DPZ recommended denial of the Petitioner's request to expand its nonconforming use because a portion of the proposed canopy, three of the proposed fuel dispensers, and a portion of the proposed car wash drive/stacking lane will be located less than 30 feet from the "future ROW" of Washington Boulevard. This future ROW, DPZ determined, is 75 feet from the center line of Route 1. As can be seen, the genesis of this requirement is a mystery. It is not contained in the Zoning Regulations which, at best, are ambiguous with respect to the definition of "right-of-way." It is not contained in the General Plan or SHA planning

documents. What's more, the application of DPZ's interpretation of the setback requirement to the facts of this case is of dubious constitutional validity. Consequently, I must conclude that the more reasonable and legally defensible application of Section 103.A.138 in this case is that the ROW setback is to be measured from the existing Route 1 right-of-way line. Using this measurement, the proposed enlargements do not violate the bulk regulations because they are all situated more than 30 feet from the existing Route 1 right-of-way line, in compliance with Section 129.E.1.d.

## ORDER

Based upon the foregoing, it is this **6th day of September 2006**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

A. That the Petition of Durge, LLC, for the enlargement and extension of a nonconforming use for a gasoline service station located in a B-1 (Business: Local) Zoning District is hereby **GRANTED**;

**Provided, however**, that the enlargement and extension will apply only to the land area, uses and structures as described in the petition submitted, and not to any other activities, uses, structures, or additions on the Property.

**HOWARD COUNTY BOARD OF APPEALS**
**HEARING EXAMINER**

_____
Thomas P. Carbo

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.